



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Claudio Tundo

CSC Docket Nos. 2015-3158, 2016-3249 and 2016-3197

OAL Docket Nos. CSV 09642-15, CSV 04671-16 and CSV 04387-16

(Consolidated)

ISSUED: SEP 25 2017

(ABR)

The appeals of Claudio Tundo, a Laborer 1 with the Borough of Ringwood (Ringwood), Department of Public Works (DPW), of his seven working day and 15 working day suspensions<sup>1</sup> and his removal, effective February 26, 2016, on charges, was heard by Administrative Law Judge Richard McGill (ALJ), who rendered his initial decision on July 31, 2017. Exceptions were filed on behalf of the appointing authority and the appellant and replies to the exceptions were filed on behalf of the appellant and the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on September 6, 2017, did not adopt the ALJ's recommendation to modify the appellant's removal to a three-month suspension. Rather, the Commission upheld the appellant's removal.

DISCUSSION

The appointing authority presented the appellant with a Final Notice of Disciplinary Action (FNDA), removing him on charges of insubordination, inability to perform duties, chronic or excessive absenteeism, neglect of duty, abuse of sick time, conduct unbecoming a public employee, and other sufficient cause. Specifically, the appointing authority asserted that the appellant declined to come

<sup>1</sup> The Commission notes the appellant's withdrawal of his appeals of the seven working day and 15 working day suspensions.

into work on February 15, 2016 to plow snow and he did not report on February 16, 2016 due to ice. It also alleged that he had a long history of abuse of sick and personal leave time dating back to November 2014. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In his initial decision, the ALJ found that the events in this matter were essentially undisputed. As a result, the ALJ observed that the Collective Negotiations Agreement (CNA) in effect during the relevant period provided employees with 15 sick days per year, five of which could be utilized as personal days each year.<sup>2</sup> The CNA also provided that the appointing authority could require a doctor's note for sick leave of any duration. The ALJ noted that the appellant finished 2013 with a balance of 0.64 sick days and no personal days; had deficits of 3.50 sick days and one personal day at the end of 2014; had year-end balances of 0.50 sick days and 0.50 personal days in 2015;<sup>3</sup> and used 5.00 sick days and 0.50 personal days in January 2016.<sup>4</sup>

With regard to February 15, 2016, the ALJ noted that Gregory Cook, Supervisor, Public Works, spoke with the appellant at 4:43 a.m. on February 15, 2016, a holiday (Presidents' Day), and told the appellant that he needed to report to work that morning. However, the appellant declined to report to work. The ALJ found that the CNA permitted him to decline to work on that day, as it was a holiday that fell on a week where he was not on the snow emergency standby schedule. The appellant testified that the road conditions on the morning of February 16, 2016 prevented him from traveling to work and he stated that he called a supervisor to advise him accordingly. Although the ALJ found that the local roads were icy on February 16, 2016, he did not find the appellant's testimony that the icy conditions prevented him from traveling to work to be credible, since all other Ringwood DPW employees were able to make it to work on that day.

The ALJ also observed that the appellant's disciplinary record included the following: a written warning in 2015; a four working day suspension in 2015 on charges primarily related to his attendance record; a seven working day suspension in May 2015 due to his failure to report to work on March 2, 2015 after an absence; and a 15 working day suspension in 2016 due to his attendance. The ALJ further

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<sup>2</sup> In *In re Woodbridge Fire District #1 Sick Leave Policy* (CSC, decided January 13, 2010), the Commission held that pursuant to *N.J.A.C. 4A:6-1.3*, collective bargaining agreements may not permit sick days to be used to conduct personal business.

<sup>3</sup> The appellant's 9.50 sick days in 2015 were dispersed as follows: 2.00 on Mondays, 2.00 on Tuesdays, 1.00 on a Wednesday, 2.00 on Thursdays, and 2.50 on Fridays. None of the appellant's 2015 sick days occurred before or after a holiday.

<sup>4</sup> The appellant's 5.00 sick days in 2016 were dispersed as follows: 2.00 on Mondays, 0.50 on a Tuesday, 1.00 on a Wednesday, 0.50 on a Thursday, and 1.00 on a Friday. Additionally, the ALJ found that 3.50 of the 5.00 sick days the appellant used in 2016 corresponded to snow events and the appellant's use of a 0.50 sick leave day on February 16, 2016 fell on the day after a holiday.

noted that the appellant was “docked” one day’s pay in January 2016 for failing to provide a required doctor’s note after a December 22, 2015 absence. The ALJ also recognized that the appellant, during the course of his employment, performed 37.09 hours of overtime, compared to another employee who had 304.76 hours of overtime.

Based upon the foregoing, the ALJ sustained the charges of insubordination, abuse of sick time, neglect of duty and conduct unbecoming a public employee. The ALJ found that the appellant’s failure to provide documentation for absences on July 21, 2015 and July 24, 2015, as ordered to in two memos, supported the charge of insubordination. The ALJ also cited the appellant’s failure to furnish documentation for other sick days in further support of the insubordination charge. As to the abuse of sick time charge, the ALJ found that the appellant’s use of sick time on Mondays and Fridays, as well as on dates corresponding to snow events in 2015 and 2016, including his absence on February 16, 2016, demonstrated a pattern of abuse, particularly as he failed to provide doctor’s notes for many of his absences. The ALJ indicated that the appellant’s use of sick days in November 2014, after producing a doctor’s note which merely restricted him to light duty, also constituted abuse of sick leave. The ALJ found that the appellant’s extensive use of sick days corresponding with snow events without producing doctor’s notes supported the charges of neglect of duty and conduct unbecoming a public employee, as it forced the appointing authority to assign his duties to other employees and negatively impacted the morale and efficiency of Ringwood DPW. The ALJ dismissed the charges of chronic absenteeism, inability to perform duties, and other sufficient cause. In dismissing the charge of chronic or excessive absenteeism, the ALJ cited the appellant’s improved attendance after his May 2015 suspension and the fact that he remained within his annual allotment of sick and personal days in 2015 and 2016. The ALJ found that the appellant’s improved attendance record after 2014 and his limited overtime compared to other Ringwood DPW employees did not support the charge of inability to perform duties. In weighing the appropriate penalty, the ALJ observed that the appellant “did not have the opportunity to improve his conduct” after the February 2016 suspension that the appellant was serving at the time the instant FNDA was issued. The ALJ noted that the appellant’s misconduct in support of the removal after the February 2016 suspension involved only two additional days, of which he only sustained the charges based on the February 16, 2016 absence. Accordingly, the ALJ found that “[w]hether one day or two, the additional misconduct d[id] not warrant a leap from a 15-day suspension to a removal.” Therefore, in view of the sustained charges and the appellant’s past record, the ALJ recommended that the appellant’s removal be modified to a three-month suspension.

In its exceptions, the appointing authority maintains that the ALJ should have sustained the charges of chronic or excessive absenteeism and inability to perform duties and, therefore, should have upheld the appellant’s removal. As to

the charge of chronic or excessive absenteeism, the appointing authority argues that the appellant's attendance record did not improve after his May 2015 suspension. Rather, it claims that the appellant continued a pattern of misconduct by routinely using sick days on Mondays, Fridays, before holidays, after holidays and following snowstorms. The appointing authority proffers that snow removal was one of the appellant's principal responsibilities as a Laborer 1, but the appellant was habitually absent following snowstorms. It submits that all of the sick days the appellant used in 2016 corresponded to snow events. Moreover, the appointing authority contends that the ALJ failed to recognize the 10 warnings it provided the appellant from November 2014 through January 2016 regarding the use of sick time, unauthorized absences and other infractions. Similarly, the appointing authority argues that the appellant's conduct supports the charge of inability to perform duties, as the appellant demonstrated a routine inability perform his critical snow removal duties by failing to make himself available on regular work days following winter storms.

As to the appellant's removal, the appointing authority maintains that the appellant's history of discipline in the relatively recent past make it appropriate to remove the appellant, as his persistent misconduct and indifference to his duties, including snow removal, demonstrate that any lesser disciplinary action is not likely to improve his conduct. It emphasizes that the written warnings it provided to the appellant were part of progressive discipline and intended to give the appellant an opportunity to improve his behavior. It notes that despite those warnings, the appellant used sick days in January 2016 to avoid snow removal duties and thereafter refused to provide doctor's notes for those absences before failing to report for a regular workday during a snowstorm on February 16, 2016.

In reply, the appellant asserts that the appointing authority failed to demonstrate that removal was the appropriate penalty. The appellant maintains that this matter must be viewed as an issue of progressive discipline for two minor infractions which the ALJ found not to be severe misconduct: one involving a holiday for which he declined overtime and a second for calling out and taking a personal day. In that regard, the appellant notes that the ALJ did not sustain the charges related to the February 15, 2016 incident because he was not scheduled to work, was not on a standby list and was permitted to decline overtime. As such, the February 16, 2016 absence, where he was unable to report to work due to icy road conditions, was the only incident that could support charges and, on its own, does not warrant removal, particularly as the suspension was not issued until after February 22, 2016 and could not form a "building block of progressive discipline." Moreover, the appellant submits that his absences in recent years were not chronic or excessive, since 2014 was the only year in which he actually exceeded his leave allotments. With regard to 2016, the appellant notes that he was within his leave allotments, having only utilized 7.5 out of the 15 days allotted to him. As such, he maintains that removal would not be appropriate, as the foregoing demonstrates

that the appointing authority is attempting to punish him for past acts already addressed by prior disciplinary actions.

In his exceptions, the appellant maintains that the insubordination and abuse of sick leave charges should be reversed. Specifically, the appellant argues that the ALJ erred in sustaining the insubordination charge, as his failure to provide doctor's notes for a March 2, 2015 absence could not, in and of itself, sustain the charge in the instant matter, given that he had already received discipline based upon that incident. As to the abuse of sick time charge, the appellant maintains he took February 16, 2016 as a personal day. In that regard, the appellant contends that the ALJ found no evidence that the appellant treated it as a sick day and submits that the Director of Ringwood DPW acknowledged in his testimony that an employee could use a personal day if he could not make it into work for a true winter-related reason. Therefore, because the appellant did not treat February 16, 2016 as a sick day and because he had already been disciplined for all prior attendance-related incidents, his absence on that date was insufficient to sustain the abuse of sick time charge. Finally, the appellant requests back pay, retroactive seniority and benefits.

In reply to the appellant's exceptions, the appointing authority proffers that while the appellant had not received the FNDA suspending him for 15 days until after February 16, 2016, he had notice of the possible suspension and underlying conduct related thereto through the Preliminary Notice of Disciplinary Action issued on February 10, 2016.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's upholding of the charges of abuse of sick time, insubordination, neglect of duty, and conduct unbecoming a public employee and dismissing the charges of inability to perform duties and other sufficient cause. However, the Commission does not agree with the dismissal of the charge of chronic or excessive absenteeism. The mere fact that the appellant did not exceed his allotted leave time in 2015 or through February 2016 does not foreclose a finding that his absenteeism during those periods was chronic or excessive. An employee may not exhibit a pattern of abuse of sick leave, such as a demonstrated pattern of use of leave days to extend weekends, holidays, or in a deliberate way that allows them to avoid performing duties at critical times. See *In the Matter of Bessie McDalton* (CSC, decided June 18, 2014) (Finding disciplinary action was warranted, despite the appellant's submission of doctor's notes, where her absences occurring either the day immediately preceding or after her days off, demonstrated a pattern of abuse). Here, the record of the appellant's relatively short tenure with the appointing authority is replete with a pattern of his use of leave time to shirk his duties, particularly the crucial public safety function of snow removal and the appellant was repeatedly warned of such between November 2014 and January 2016. When the appellant failed to report to work on February 16, 2016, it was the seventh sick day he used in 2016, meaning

that he had used nearly half of his sick leave days for 2016 in approximately one-and-a-half months. Notably, all seven sick days he used in 2016 corresponded to snow events. Viewed in that light, the February 16, 2016 absence is sufficient to support the charge of chronic or excessive absenteeism.

With regard to the penalty, the Commission does not agree with the ALJ's recommendation to modify the removal to a three-month suspension. In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 N.J.A.R. 2d (CSV) 463. Moreover, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. See *Henry v. Rahway State Prison*, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See *Carter v. Bordentown*, 191 N.J. 474 (2007).

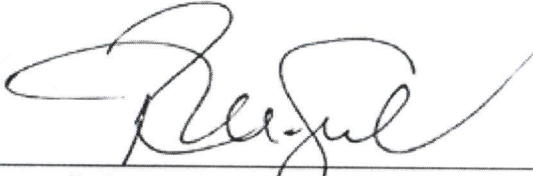
The charges that were sustained are serious. The appellant's pattern of using sick time after a snow event or to extend a weekend or holiday is clearly disruptive to the appointing authority's work operations, particularly the vital public safety function of snow removal, given that those duties had to be reassigned to other employees. See *In the Matter of Wilbur George* (CSC, decided October 1, 2014) (Appellant's excessive use of sick time supported disciplinary action, where duties to be performed by appellant on days he was absent were either left undone or performed by someone else, creating an adverse impact on governmental operations). Moreover, it is clear that the appellant was sufficiently apprised of the need to correct deficiencies in his inappropriate use of his sick time. In that regard, since March 2013, the appointing authority issued no fewer than 10 communications to the appellant regarding issues with his use of sick leave time or requests for required documentation. The appellant's record also evidenced a four working day suspension in April 2015 and a seven working day suspension in May 2015, both for attendance-related infractions. Accordingly, based upon the seriousness of the appellant's offenses, and his prior disciplinary history, which includes one minor disciplinary action and two major disciplinary actions within a three-year period for similar infractions, the Commission concludes that removal is the appropriate penalty.

**ORDER**

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was appropriate. Therefore, the Commission affirms that action and dismisses the appellant's appeal.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 6<sup>TH</sup> DAY OF SEPTEMBER, 2017



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Robert M. Czedz, Chairperson  
Civil Service Commission

Inquiries  
and  
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Attachment



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NOS. CSV 09642-15,  
CSV 04671-16 and CSV 04387-16  
AGENCY DKT. NOS. 2015-3158,  
2016-3249 and 2016-3197

**IN THE MATTER OF CLAUDIO TUNDO,  
BOROUGH OF RINGWOOD DEPARTMENT  
OF PUBLIC WORKS.**

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**Ryan M. Lockman, Esq.,** for Claudio Tundo

**Justin D. Santagata, Esq.,** for the Borough of Ringwood Department of Public  
Works (Kaufman Semeraro & Leibman, attorneys)

Record Closed: June 26, 2017

Decided: July 31, 2017

**BEFORE RICHARD McGILL, ALJ:**

Claudio Tundo (appellant) filed appeals from two suspensions and a removal on charges from the position of Laborer 1 with the Borough of Ringwood Department of Public Works (respondent). The charges against appellant in the removal proceeding are as follows: (1) insubordination; (2) inability to perform duties; (3) chronic absenteeism; (4)



neglect of duty; (5) abuse of sick time; (6) conduct unbecoming a public employee; and (7) other sufficient cause.

The specification in the Preliminary Notice of Disciplinary Action in the removal proceeding states that appellant did not report to work on February 15 and 16, 2016, and that he has a long history of abuse of sick and personal time dating back to November 2014. The specification in the Final Notice of Disciplinary Action states that appellant has a long history of abuse of sick and personal time as well as a history of excessive absenteeism.

### **PROCEDURAL HISTORY**

Respondent advised appellant of the removal on charges by Preliminary Notice of Disciplinary Action dated February 22, 2016. Thereafter, respondent informed appellant by Final Notice of Disciplinary Action dated February 29, 2016, that the charges were sustained and that the disciplinary action was removal.

Appellant requested a hearing by letter dated March 10, 2016, and the matter was transmitted to the Office of Administrative Law on March 21, 2016, for determination as a contested case. By Order dated August 9, 2016, the removal proceeding was consolidated with the appeals of two suspensions on charges, I/M/O Claudio Tundo, Borough of Ringwood Department of Public Works, OAL Dkt. NOS. CSV 09642-15 and CSV 04671-16.

Hearings were held on May 5 and 9, 2017, at the Office of Administrative Law in Newark, New Jersey. On the first hearing day, appellant withdrew his appeals of the two suspensions. The record closed on June 26, 2017, upon receipt of written summations.

## ISSUES

The issues in this proceeding are whether the charges should be sustained and, if so, whether removal is the appropriate disciplinary action. The two main factual issues are whether appellant was called to report for work on February 15, 2016, and whether appellant was unable to get to work on February 16, 2016, due to icy road conditions.

## FACTS

### A. Undisputed Facts

The general course of events in this matter is essentially undisputed, and I **FIND** as follows:

#### 1. Background

Appellant became a permanent employee of respondent as a Laborer 1 effective March 18, 2013, after being employed as a seasonal employee. Appellant's duties included driving a truck to plow snow.

Respondent has an Employee Manual, which includes sections on sick leave and abuse of sick leave. According to the section on sick leave, respondent's policy is subject to any bargaining unit contracts. The Collective Negotiations Agreement (CNA) in effect during the pertinent period of time provided that a full-time employee accumulates fifteen sick days per year. An employee may utilize five sick days as personal days yearly. In its attendance records, respondent provides an allowance of ten sick days and five personal days at the beginning of each year. If a personal day is not utilized, it is accrued to the next year as an unused sick day.

The section of the Employee Manual on abuse of sick time states as follows:

An event is any sick time usage evidencing a pattern of absenteeism, including absences on: Fridays or Mondays, the first or last business day of the week; the day before or after a holiday or vacation day; or any combination of the above. An event will be charged for any usage for which a doctor's note is not supplied when required by this policy or required in conjunction with a disciplinary action.

Further, the Borough may, in its sole discretion, require a doctor's note for sick leave of any duration. A doctor's note must be written by a treating physician and provide sufficient information to determine the reason for the use of sick time.

The CNA also has a section on overtime. The pertinent provisions state as follows:

G. Employees shall work overtime when requested to do so, if possible, and failure to work as requested will result in the employee being charged with the overtime on the overtime distribution records (and losing their place on the list if they took same).

H. Overtime work shall be distributed by means of overtime roster. Each employee shall be listed on such roster. An employee unable to be reached for an overtime opportunity will have been considered to have used his turn. However, this provision shall not be construed to prevent men already on a task from being continued on for overtime. Employees on vacation will not be called for overtime unless the list has been exhausted and the department head deems it necessary.

Respondent maintained an early morning start schedule and a snow emergency standby schedule, which were posted in the Department of Public Works garage. Employees were compensated at a flat weekly rate when they were on standby.

## 2. Attendance Record

According to a summary of appellant's attendance records, appellant was out twenty-six days in 2013, fifty-eight days in 2014 and twenty-three days in 2015. These dates include fourteen "Worker's Comp" days as a result of an injury on the job in 2013, approximately thirty-three days due to "Disability" and one day for "Worker's Comp" in

2014, and five suspension days in 2015. Net of these amounts, appellant was out twelve days in 2013, twenty-four days in 2014 and eighteen days in 2015.

According to appellant's attendance record for 2013, in or about May, appellant had balances of 14.64 sick days, 4.00 personal days and 10.64 vacation days. Appellant used 14.00 sick days, 4.00 personal days, and 10.50 vacation days, leaving balances of 0.64 sick days, no personal days and 0.14 vacation days. Of the fourteen sick days, five were on a Monday, two were on a Friday and two were days before a holiday. Appellant produced a doctor's note for three consecutive sick days in August covering a Monday through Wednesday.

Appellant began 2014 with balances of 10.64 sick days, 5.00 personal days and 10.14 vacation days. Appellant used 14.14 sick days, 6.00 personal days and 10.14 vacation days, leaving deficits of 3.50 sick days and 1.00 personal day. The sick days included three Mondays, four Tuesdays, two Wednesdays, two Thursdays and three Fridays. Three of the Tuesdays were days after a holiday. Appellant produced doctor's notes for ten of the sick days. Appellant was assigned to light duty on November 19, 22, 23 and 26, 2014, but he did not report for work.

Appellant began 2015 with balances of 10.00 sick days, 5.00 personal days and 10.00 vacation days. Appellant was docked four vacation days as a disciplinary action as a result of the absences in November 2014. Appellant used 9.50 sick days, 4.50 personal days and 6.00 vacation days, leaving balances of 0.50 sick days, 0.50 personal days and no vacation days. Appellant produced doctor's notes for seven of the sick days. The sick days were dispersed as follows: two on Mondays, two on Tuesdays, one on a Wednesday, two on Thursdays and 2.50 on Fridays.

In January 2016, appellant used five sick days and half a personal day. Two of the sick days were on Mondays, and one was on a Friday. Appellant produced a doctor's note for a four-day span in which he used a total of three sick days. Appellant took off a Tuesday after a holiday on February 16, 2016.

### 3. Medical Documentation

Scott M. Heck is respondent's Borough Manager and Director of Public Works. On January 2, 2015, Mr. Heck sent a written warning to appellant for absences on November 19, 22, 23 and 26, 2014. The letter emphasizes that the doctor's note submitted by appellant indicated that appellant could perform light duty which was assigned to him.

By memo dated August 4, 2015, Mr. Heck advised appellant that he was required to provide documentation for sick leave on July 21 and 24, 2015. Mr. Heck reminded appellant that use of sick leave to extend weekends, vacations and other time off is improper use of sick leave. In a memo dated August 28, 2015, Mr. Heck noted that appellant had not provided the documentation as required by the memo dated August 4, 2015. Mr. Heck again stated that absences must be documented and that notes are required for any sick leave. By memo dated January 15, 2016, Mr. Heck noted that appellant took sick days from January 11 to 14, 2016, and that the doctor's note did not explain why appellant actually could not work. Mr. Heck sent appellant a memo dated January 27, 2016, in regard to his absences on January 22 and 25, 2016, and reminded him that he was required to provide a doctor's note for every sick day.

### 4. Overtime

During the course of his employment, appellant performed 37.09 hours overtime. By comparison, another employee had 304.76 hours of overtime. Mr. Heck acknowledged that Section G of the provision on overtime in the CNA does not say anything about discipline if an employee does not come in for overtime.

### 5. Snow Emergencies

On March 1, 2015, a supervisor called appellant at 11:00 p.m. to come in to plow snow. Appellant said that he could not do so because he was driving home from Pennsylvania. Appellant was told to call another supervisor when he got home.

At 11:12 p.m., appellant called the other supervisor and said that he would report to work at 7:00 a.m. on Monday. Appellant called the following morning and said that he was not coming to work because he was sick.

Appellant reported to work on Tuesday and said that he had to go to "O.H.," meaning Occupational Health. The supervisor granted appellant's request.

There was a snow event on January 11 and 12, 2016. Appellant was out sick on January 11, 2016, and on January 12, 2016, he left early and used half of a sick day.

A major snowstorm began on Friday, January 22, 2016, continued through January 24, 2016, and dropped 21.7 inches of snow. Appellant took sick days on January 22, 2016, and on Monday, January 25, 2016, while other employees worked the entire weekend to clear the snow.

Another snow event occurred on February 15 and 16, 2016. There was holiday, President's Day, on February 15. Appellant was not on the snow emergency standby schedule for the week from February 15 to February 21, 2016. Other facts in regard to this snow event are in dispute.

## 6. Past Record

On November 6, 2014, appellant received a written warning for use of sick time and personal time beyond the number of days in the union contract. In conjunction with a written warning dated January 2, 2015, Mr. Heck docked appellant four vacation days for his absences in November 2014. By Final Notice of Disciplinary Action dated April 17, 2015, appellant was given a four-day suspension for various charges related primarily to attendance in February 2015. By Final Notice of Disciplinary Action dated May 15, 2015, appellant was given a seven-day suspension for his failure to report to work in response to a call on March 1, 2015, and his absence on March 2, 2015.

By memo dated January 5, 2016, appellant was docked a day's pay for failure to comply with notification requirements in regard to an absence on December 22, 2015. By Final Notice of Disciplinary Action dated February 22, 2016, appellant was given a fifteen-day suspension as the result of his absences on January 22 and 25, 2016. The suspension was scheduled to run from February 22, 2016, to March 11, 2016. It is noteworthy that the removal in this matter became effective February 26, 2016, while the fifteen-day suspension was still in effect.

### B. Disputed Facts

Gregory Cook testified that he is employed by respondent as a supervisor in the Department of Public Works. On February 15, 2016, Supervisor Cook was calling employees in for snow-related work. At 4:43 a.m. Supervisor Cook called appellant and spoke with him. Supervisor Cook said that he needed appellant to report to work, and appellant responded that he would not come in. Supervisor Cook recorded appellant's response on an overtime list.

Mr. Heck testified that a weather report was posted prior to February 15 and 16, 2016, and that there was a holiday on February 15, 2016. Appellant was called in on February 15, 2016, but he declined to come in. The following day, February 16, 2016, was a regular work day, but appellant did not report for work. Appellant said that his driveway was icy and he could not come in. Everyone else reported to work including individuals who travel greater distances than appellant. As a result, other employees had to cover appellant's route.

Appellant testified that he did not receive a telephone call from Supervisor Cook on February 15, 2016. Further, appellant never told Supervisor Cook that he did not want to work. By the evening of February 15, 2016, appellant had not received any call to come to work.

Appellant further testified that on the morning of February 16, 2016, the roads were icy and he had a forty-minute drive to work. Appellant went outside at approximately 5:45 a.m. to get to work by 7:00 a.m. Appellant pulled out of his driveway, but his all-wheel-drive vehicle slid into the curb. Appellant tried to get to work, but he turned back due to dangerous road conditions. Appellant called work about 6:00 a.m. and reported that he could not report to work due to icy road conditions. The supervisor said "Okay" and that he would see him the following day.

Respondent's witnesses impressed as more reliable, and their testimony is accepted as true. Based thereon, I **FIND** as follows. On February 15, 2016, Supervisor Cook telephoned appellant and spoke with him at 4:43 a.m. Supervisor Cook said that he needed appellant to come to work, but appellant declined to do so. On the morning of February 16, 2016, the roads were icy as the result of a snowstorm. Nonetheless, all other employees got to work. Appellant's testimony is not persuasive that the road conditions prevented him from getting to work for the entire day.

### **LAW AND ANALYSIS**

An appointing authority may discipline an employee for insubordination, inability to perform duties, chronic absenteeism, neglect of duty, abuse of sick time, conduct unbecoming a public employee, and other sufficient cause. N.J.A.C. 4A:2-2.3(a). The appointing authority's action is subject to review by the Civil Service Commission, which after a de novo hearing makes an independent determination as to both the charge and the penalty. West New York v. Bock, 38 N.J. 500, 519 (1962). In an appeal concerning a major disciplinary action, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The appointing authority must prove its case by a fair preponderance of the believable evidence. In re Polk License Revocation, 90 N.J. 550, 560 (1982); In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971).

The first charge to be considered is chronic absenteeism. The summary of appellant's absences included fourteen Worker's Comp days in 2013 and approximately



thirty-three days for disability and one day for Worker's Comp in 2014. These dates are well in the past, and it seems evident that an appointing authority should not discipline an employee due to disability or time taken off due to an injury on the job. While the details as to appellant's disability and injuries on the job were not presented at the hearings, these absences will not be considered in regard to the charge of chronic absenteeism. Likewise, respondent included five suspension days as absences in 2015. These days also should not be considered in regard to a charge of chronic absenteeism.

Appellant finished 2013 with balances of 0.64 sick days and no personal days. In 2014, appellant had deficits of 3.50 sick days and 1.00 personal day by the end of the year. Those absences along with other charges led to disciplinary action in the form of a four-day suspension in April 2015. Thereafter, appellant's attendance improved in 2015 with year-end balances of 0.50 sick days and 0.50 personal days. In 2016, appellant used five sick days and half a personal day in January. In sum, appellant was previously disciplined for his attendance in 2014, and in 2015, which his last full year, appellant's sick and personal days were within his allotted time and a definite improvement over 2014. Appellant's use of sick and personal days in January 2016 was substantial for one month but well within his annual allotment. In view of the fact that appellant remained within his annual allotment of sick and personal days in 2015 and 2016 and the improvement in his attendance since the previous disciplinary action, I **CONCLUDE** that the charge of chronic absenteeism must be dismissed.

The next charge is inability to perform duties. In support of this charge, respondent cites appellant's attendance record and limited overtime. Appellant's overall attendance since the beginning of 2015 was satisfactory and does not bespeak an inability to perform his duties. Likewise, appellant's limited overtime is not necessarily indicative of an inability to perform duties. Under the circumstances, I **CONCLUDE** that the charge of inability to perform duties must be dismissed.

The next charge against appellant is insubordination. Insubordination includes acts of disobedience to proper authority. Here, in memos dated August 4, 2015, and August

28, 2015, Mr. Heck directed appellant to provide documentation for absences on July 21 and 24, 2015. Appellant failed to provide the documentation. This failure constituted insubordination. In addition, appellant failed to provide documentation in regard to other days on which he used sick time. Therefore, I **CONCLUDE** that the charge of insubordination must be sustained.

The next charge against appellant is abuse of sick time. It is noteworthy that the Final Notice of Disciplinary Action sets forth the charge of abuse of sick leave, while the specification states that appellant has a long history of abuse of sick and personal time dating back to November 2014. Appellant attached a summary of appellant's attendance, but there is no identification of specific dates that constitute abuse of sick time.

Despite the lack of specificity as to dates, the charge of abuse of sick time may be considered based on the definition in the Employee Handbook for the period from November 2014 to February 2016. The only full year in question is 2015. One basis for abuse of sick time is use of sick time on a Monday, a Friday or a day before or after a holiday. In 2015, appellant's use of 9.5 days of sick time was dispersed as follows: 2.00 on Mondays, 2.00 on Tuesdays, 1.00 on a Wednesday, 2.00 on Thursdays, and 2.50 on Fridays. None of the sick time was before or after a holiday. In January 2016, appellant used five sick days dispersed as follows: 2.00 Mondays, 0.50 of a Tuesday, 1.00 Wednesday, 0.50 of a Thursday and 1.00 Friday. Significantly, 3.50 of the 5.00 sick days corresponded to snow events. Additionally, appellant did not report to work on a Tuesday after a holiday in February 2016. This day also corresponded to a snow event.

Appellant also failed to produce adequate medical documentation for some of his absences. In November 2014, appellant produced a doctor's note, but Mr. Heck interpreted it to mean that appellant could perform light duty. Appellant believed that he could not work at all. Mr. Heck's interpretation is supported by the note which states as follows: "Patient can return to work with no use of the left arm and no overhead work if available."

In 2015, appellant failed to produce a doctor's note for a sick day on March 2, 2015. This absence corresponded to a snow event. In 2016, appellant did not provide a doctor's note for sick days on January 22 and 25, 2016. These absences also corresponded to a snow event.

Finally, appellant did not report for work on February 16, 2016. It is not clear how appellant or respondent treated this day for purposes of the attendance record, but there is no indication that appellant provided a doctor's note. This date also corresponded to a snow event.

In view of the above, appellant's sick days in 2016 showed a clear pattern of corresponding to snow events. Further, appellant failed to provide doctor's notes for some of his sick days. Under the circumstances, I **CONCLUDE** that the charge of abuse of sick time must be sustained.

The next charge is neglect of duty. Again, respondent did not specify in the Preliminary or Final Notice of Disciplinary Action the exact conduct that constitutes neglect of duty. Nonetheless, it appears that the concern is appellant's failure to report to work on regular work days that involved snow events.

In the above discussion of abuse of sick time, various dates were identified on which appellant took sick days that corresponded with snow events. Appellant did not produce doctor's notes for those dates, and the effect of his absence was that his work had to be assigned to other employees. Under the circumstances, I **CONCLUDE** that the charge of neglect of duty must be sustained.

The next charge against appellant is conduct unbecoming a public employee. "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a government unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City

of Atlantic City, 152 N.J. 532, 554 (1998); In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

Here, appellant repeatedly took sick days when there was a snow event. The effect of appellant's neglect of duty was that his work had to be assigned to other employees. It is reasonable to infer that appellant's absences adversely affected the morale and efficiency of respondent's Department of Public Works. Under the circumstances, I **CONCLUDE** that the charge of conduct unbecoming a public employee must be sustained.

The final charge against appellant is other sufficient cause. The Preliminary and Final Notices of Disciplinary Action do not specify anything in particular as the other sufficient cause, but in its written summation respondent stated that appellant could no longer be trusted as even a minimally productive employee.

A charge of other sufficient cause typically involves a violation of a rule or regulation of the appointing authority. Here, the basis for the charge of other sufficient cause was not stated with specificity prior to filing of post-hearing summations. Further, there was no testimony as to appellant's overall job performance. It follows that there is no factual basis for this charge. Therefore, I **CONCLUDE** that the charge of other sufficient cause must be dismissed.

### **Disciplinary Action**

The factors to consider with respect to the disciplinary action are the nature of the charges sustained and appellant's past record. West New York v. Bock, 38 N.J. at 523-24. Progressive discipline is a recognized and accepted principle in choosing the appropriate disciplinary action. In re Herrmann, 192 N.J. 19, 33 (2007). But removal may be the appropriate discipline for a single instance of severe misconduct. Ibid.

The misconduct in this matter relates to attendance. Appellant abused his sick time by using sick days to avoid working during snow events. The same avoidance of work during snow events constitutes neglect of duty and conduct unbecoming a public employee. It is noteworthy that the same conduct underlies these three charges. In addition, appellant's failure to provide medical documentation is a form of abuse of sick time under respondent's Employee Manual. This same misconduct underlies the charge of insubordination. Under the circumstances, the charges which have been sustained in this matter certainly warrant disciplinary action.

On the other hand, the charges which were sustained in this matter relate to attendance. Under the circumstances, this case does not involve the type of severe misconduct where one incident would warrant removal. It follows that progressive discipline would be appropriate for this case.

With respect to past record, appellant received two written warnings in regard to his use of sick time, and he was given a four-day suspension related to sick time. The first major disciplinary action against appellant was a seven-day suspension imposed by notice dated May 15, 2015. Thereafter, appellant's attendance improved significantly for the balance of 2015.

The second major disciplinary action against appellant was a fifteen-day suspension imposed by notice dated February 22, 2016. The suspension was scheduled to run from February 22, 2016, to March 11, 2016. The difficulty with this suspension from the perspective of progressive discipline is that appellant was removed effective February 26, 2016, and as a result, he did not have the opportunity to improve his conduct in response to the disciplinary action. It follows that the only major disciplinary action, to which appellant had an opportunity to respond, was the seven-day suspension.

Further, subsequent to the Preliminary Notice of Disciplinary Action dated February 10, 2016, advising appellant of the possible fifteen-day suspension, appellant's subsequent misconduct in support of the removal involved only two additional days, i.e.,

February 15 and 16, 2016, and only the charges based on February 16, 2016, were sustained in this proceeding. Whether one day or two, the additional misconduct does not warrant a leap from a fifteen-day suspension to a removal.

Under the circumstances, removal is a grossly excessive disciplinary action. In view of the charges which were sustained in this matter and appellant's past record, I **CONCLUDE** that a suspension for a period of three months is the appropriate disciplinary action.

Accordingly, it is **ORDERED** that:

1. The charge of chronic absenteeism be dismissed.
2. The charge of inability to perform duties be dismissed.
3. The charge of abuse of sick time be sustained.
4. The charge of insubordination be sustained.
5. The charge of neglect of duty be sustained.
6. The charge of conduct unbecoming a public employee be sustained.
7. The charge of other sufficient cause be dismissed.
8. The disciplinary action shall be a suspension for a period of three months.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 31, 2017

DATE

Richard McGill

RICHARD McGill, ALJ

Date Received at Agency:

Date Mailed to Parties:

AUG 1 2017

ljb

Steven Sanders

DIRECTOR AND  
CHIEF ADMINISTRATIVE LAW JUDGE

## APPENDIX

### WITNESS LIST

For appellant:

Claudio Tundo

For respondent:

Scott Heck

Gregory Cook

Susan Weller

### EXHIBIT LIST

- A-1 Letter dated March 21, 2013, from Scott Heck to Claudio Tundo
- A-2 Early Morning Start – 11/23/15 to 3/20/16
- A-3 Summary notes – attendance
- A-4 Absentee Request Form – 1/12/16
- A-5 Absentee Request Form – 1/14/16
- A-6 Payroll record – 2013
- A-8 Photograph of Claudio Tundo's driveway
  
- R-3 Employee Manual for Borough of Ringwood
- R-4 Preliminary Notice of Disciplinary Action dated February 22, 2016, and Final Notice of Disciplinary Action dated February 29, 2016
- R-5 Memo dated August 4, 2015, from Scott Heck to C. Tundo
- R-6 Memo dated August 28, 2015, from Scott Heck to C. Tundo
- R-7 Memo dated September 2, 2015, from Scott Heck to Claudio Tundo
- R-8 Memo dated November 6, 2014, from Scott Heck to C. Tundo
- R-9 2014 attendance record for Claudio Tundo



- R-10 Doctor's note dated November 19, 2014
- R-11 Letter dated November 24, 2014, from Scott M. Heck to Claudio Tundo
- R-12 Final Notice of Disciplinary Action dated February 22, 2016
- R-13 Interoffice Memorandum dated November 24, 2014, from Sue Rohdieck to Scott Heck
- R-14 Letter dated January 2, 2015, from Scott M. Heck to Claudio Tundo
- R-15 Collective Negotiations Agreement effective January 1, 2014
- R-16 Memo dated January 5, 2016, from Scott Heck to C. Tundo
- R-17 Memo dated January 30, 2015, from Scott Heck to C. Tundo, re: Call Out
- R-18 Preliminary Notice of Disciplinary Action dated February 10, 2016
- R-19 Memo dated January 30, 2015, from Scott Heck to Claudio Tundo, re: Standby
- R-20 Final Notice of Disciplinary Action dated April 17, 2015
- R-21 Email dated March 5, 2015, from Doug Edler to Scott Heck
- R-22 Memo dated January 15, 2016, from Scott Heck to C. Tundo
- R-23 Letter dated May 15, 2015, from Kelley Halewicz to George Burr, Jr. and Justin Santagata, Esq., with Final Notice of Disciplinary Action dated May 15, 2015
- R-24 Memo dated January 27, 2016, from Scott Heck to C. Tundo
- R-25 CD recorded on February 25, 2016
- R-26 2015 attendance record for Claudio Tundo
- R-28 Snow Emergency Standby Schedule – 11/23/15 to 3/20/16
- R-29 WeatherWorks Certified Snowfall Totals
- R-30 Memo dated June 18, 2015, from Susan Weller to Scott Heck
- R-30A Memo dated June 18, 2015, from Susan Weller to Scott Heck
- R-31 Ringwood DPW Overtime List – 2/15/16
- R-32 Computer screen; re: photo on 2/16/16